(3)

Supreme Court, U.S.
FILED
JUL 18 2002
OFFICE OF THE CLERK

No. 01-1559

In the
Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688

295

TABLE OF CONTENTS

	Page
THE SOLICITOR GENERAL CONCEDES THE CONFLICT AMONG THE CIRCUITS	1
THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RECONCILE THE CONFLICT AMONG THE CIRCUITS	3
THE SECOND AND SEVENTH CIRCUITS' BAR TO PRESENTING INEFFECTIVENESS CLAIMS IN § 2255 PROCEEDINGS DEPRIVES THE DISTRICT COURTS OF AN OPPORTUNITY TO EVALUATE INEFFECTIVENESS CLAIMS	5
CONCLUSION	9

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Billy-Eko v. United States, 8 F.3d 111 (2d Cir. 1993)	3
Commissioner of Internal Revenue v. Bilder, 369 U.S. 499 (1962)	3
Guinan v. United States, 6 F.3d 468 (7th Cir. 1993)	3, 5, 6
McMann v. Richardson, 397 U.S. 759 (1970)	2
Strickland v. Washington, 466 U.S. 668 (1984)	2, 6
Thomas v. Arn, 474 U.S. 140 (1985)	7
United States v. Cronic, 466 U.S. 648 (1984)	4
United States v. DeRewal, 10 F.3d 100 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994)	3
United States v. Galloway, 56 F.3d 1239 (10th Cir. 1995)	3, 5
Miscellaneous:	
John M. Burkoff & Hope L. Hudson, *Ineffective Assistance of Counsel* (Clark Boardman Callaghan) (1994)	3

THE SOLICITOR GENERAL CONCEDES THE CONFLICT AMONG THE CIRCUITS

The question presented is whether this Court should resolve the recurring and constitutionally important conflict among the Circuits as to when a criminal defendant must raise a Sixth Amendment challenge to the effectiveness of his trial counsel without risk of forfeiture.

Most Circuit courts recognize that 28 U.S.C. § 2255 provides a more efficient and effective means of resolving an ineffectiveness complaint. In fact, the Solicitor General concedes that the Second and Seventh Circuits stand alone in their stringent holding that a defendant, who is represented by new counsel on appeal, forfeits an ineffectiveness claim that was not raised on direct appeal. (Brief for Solicitor General at 9, 10 n.5.) But at the same time the Solicitor General reaffirms the government's long-standing position, which is in direct conflict with the Second and Seventh Circuits, that ineffectiveness claims *should* be litigated in a § 2255 proceeding rather than on direct appeal, without any showing of cause or prejudice. (Brief for Solicitor General at 10.)

Despite acknowledging a clear disagreement among the Circuits, the Solicitor General now contends that uniformity is not required because this question is treated as a "procedural rule." But even procedural rules are subject to this Court's supervisory power where they implicate a defendant's constitutional rights, or where the Circuits are divided over the application of such rules.

At issue is whether a criminal defendant can be deprived of his right to judicial review of a conviction that allegedly was obtained in violation of his Sixth Amendment right to effective assistance of counsel.[1] Uniformity among the courts of appeals *is* appropriate on this matter because ineffectiveness of trial counsel is *not* a procedural technicality.

In light of the Solicitor General's brief, it is evident that this Court is being asked to decide whether access to 28 U.S.C. § 2255 should be consistent throughout the nation. Put another way, should the ability to present a constitutional claim pursuant to § 2255 vary from Circuit to Circuit? It is a fact that § 2255 was enacted by Congress, and is not a local Circuit court rule.

Moreover, why should a defendant in New York be denied the right to assert an ineffectiveness claim that could result in the reversal of a life or death sentence, while defendants convicted in federal courts in New Jersey or Colorado are empowered to raise that constitutional complaint in a § 2255 proceeding? This is hardly "procedural." Certainly, under any uniform federal system, such drastic differences in due process, with such significant consequences, should not be left unresolved by this Court.

---

[1] In *Strickland v. Washington*, 466 U.S. 668, 684 (1984), this Court confirmed that the Sixth Amendment right to counsel is needed in order to protect the fundamental right to a fair trial. Moreover, "the right to counsel is the right to the effective assistance of counsel." 466 U.S. at 686; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RECONCILE THE CONFLICT AMONG THE CIRCUITS

Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Here, the Second and Seventh Circuit courts have entered decisions[2] that are in clear conflict with decisions of other Circuit courts.[3] In fact, the Solicitor General describes them as "competing rules." (Brief for Solicitor General at 11.)

The question of when the competency of counsel, under the Sixth Amendment to the United States Constitution, must be raised is an "important matter" of national interest and concern.[4] A uniform rule is required to govern the assertion of that claim which is of *constitutional* magnitude.

Rule 10(a) further provides that certiorari may be granted where a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of

---

[2] *Massaro v. United States*, Pet. App. 3-10; *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993); *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993).

[3] *See, e.g., United States v. DeRewal*, 10 F.3d 100, 101 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994); *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (*en banc*).

[4] "Ineffective assistance of counsel is one of the most — if not *the* most — common appeal grounds asserted by convicted criminal defendants as appellants." John M. Burkoff & Hope L. Hudson, *Ineffective Assistance of Counsel* 1-3 (Clark Boardman Callaghan) (1994) (emphasis theirs).

This Court previously recognized the importance of granting certiorari to resolve a conflict among the Circuits, because of a "contrary holding by the Court of Appeals for the Second Circuit, and the need for a uniform rule on the point . . . to resolve the conflict." *Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499, 501 (1962).

this Court's supervisory power." The creation of a bar to, or a forfeiture of, the presentation of constitutional claims in § 2255 proceedings constitutes a radical departure from the "accepted and usual course of judicial proceedings" whereby § 2255 motions are *the* proper and conventional way to challenge counsel's ineffectiveness. Even the Solicitor General agrees that the courts of appeals express a strong preference (or in some cases require) that ineffective assistance claims be presented to the district court, in the first instance, through a § 2255 motion. (Brief for Solicitor General at 9.)

These considerations must be balanced against the factors cited by the Solicitor General as "advantages" of the rule advocated by the Second and Seventh Circuits.[5] Each of these "competing" concerns underscores the need for this Court's resolution of these conflicting viewpoints.

The propositions of the Petitioner and countered by the Solicitor General all illustrate the serious questions that abound as to whether federal courts should follow (1) the Second and Seventh Circuits, (2) the other Circuits, or (3) the rule routinely suggested by the government.[6] This case fully qualifies for the exercise of this Court's supervisory power to impose some consistency and uniformity in this important area of controversy.

---

[5] The Tenth Circuit's *en banc* decision in *United States v. Galloway*, contains a comprehensive discussion of the benefits and flaws of the various approaches to this significant question. 56 F.3d at 1240-42.

[6] *United States v. Cronic*, 466 U.S. 648, 666 n.42 (1984) ("[t]he Government argues that a defendant can attack the actual performance of trial counsel only through a petition for postconviction relief under 28 U.S.C. § 2255").

As recognized by Judge Easterbrook, of the Seventh Circuit, "[r]eview will come eventually, in light of the conflict and the Solicitor General's position."[7] Review should come now, *in this case involving a life sentence*, where no court has ever reviewed the merits of the Petitioner's Sixth Amendment claim.[8]

THE SECOND AND SEVENTH CIRCUITS' BAR TO PRESENTING INEFFECTIVENESS CLAIMS IN § 2255 PROCEEDINGS DEPRIVES THE DISTRICT COURTS OF AN OPPORTUNITY TO EVALUATE INEFFECTIVENESS CLAIMS

The approach embraced by the government, as well as most Circuits, "ensures that the district court has an opportunity to pass on all ineffectiveness claims under 28 U.S.C. 2255 before their presentation to an appellate court." (Brief for Solicitor General at 12.) The Tenth Circuit calls the reasons for this rule "self-evident," stating that a "factual record must be developed in and addressed by the district court in the first instance for effective review."[9]

---

[7] *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring).

[8] The Solicitor General contends, "this Court has repeatedly declined to grant review in similar cases presenting the same issue." (Brief for Solicitor General at 12-13.) However, the fact that defendants from the Second and Seventh Circuits continue to seek sanctuary in this Court only emphasizes the extent of this problem. Moreover, the cases cited by the Solicitor General are readily distinguishable from the instant case and do not involve a defendant serving a life sentence. *Sprecher v. United States*, No. 95-82 (37 months imprisonment); *Moghal v. United States*, No. 95-9027 (60 months imprisonment); *Velasquez v. United States*, No. 95-6925 (121 months imprisonment).

[9] *Galloway*, 56 F.3d at 1240.

In stark contrast, the Second and Seventh Circuits obligate a newly engaged appellate attorney to present *all* potential ineffectiveness claims on direct appeal, regardless of whether they were fully resolved on the record, to ensure that the issues are not procedurally barred or waived.[10] Such an approach then compels the court of appeals to evaluate whether the issue was sufficiently developed on the record to merit review, or whether the ineffectiveness question requires further development before the district court.

This cumbersome approach actually deprives district courts of a chance to evaluate and rule on certain ineffectiveness claims. However, in *Strickland v. Washington*, 466 U.S. 668, 689 (1984), this Court confirmed that a court deciding an ineffectiveness claim must determine whether, in light of all the circumstances, counsel's acts or omissions were outside the wide range of competent counsel. The district court, which is in a better position to evaluate any hearing testimony,[11] should not be deprived of that opportunity.[12]

---

[10] Appellate counsel in the Second Circuit must now present any possible ineffectiveness claim on direct appeal because there is no way to tell whether the Second Circuit will find that the record was fully developed. In the current case there was never any hearing on the issue. Defense counsel was never called upon to explain or justify his failings. This was also not the subject of a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure. And yet, it was found to be fully developed on the record, and the Defendant was barred from raising it in a § 2255 motion.

The Second Circuit ruled that new appellate counsel should have raised the Petitioner's ineffective assistance complaint on direct appeal because the claim was based "solely on the record adduced at trial." (Pet. App. 7.) But since the ineffectiveness claim relates to the trial lawyer's failure to conduct a proper investigation, how can those failings ever be sufficiently developed on the trial record without a hearing or further exploration? Indeed, it is highly unrealistic to expect or insist that trial counsel take pains to develop a full record of his or her own ineffectiveness.

[11] The "trial judge is best situated to assess overall performance and prejudice, yet a claim of ineffective assistance presented on direct appeal asks the court of appeals to act without the district judge's views." *Guinan v. United States*, 6 F.3d at 473 (Easterbrook, J., concurring).

The continuing rivalry that exists in the Circuits over such an important issue as the effective assistance of counsel, which goes to the very heart of our system of justice, is intolerable. In the United States, the right to challenge the constitutionality of a conviction, based upon a Sixth Amendment violation, must be the same for all. Otherwise, that right is rendered conditional for many. And, a conditional right, heavily encumbered by unbearable and unrealistic preservation requirements, is no right at all. Local or parochial preferences of the Second and Seventh Circuits must yield to the superior force of a national rule that lends stability and certainty to an area of growing constitutional litigation.

Joseph Massaro, a citizen of the United States, is suffering a life sentence of imprisonment for a crime he has always maintained he did not commit. But, just as important is his unqualified assertion that the effective assistance of a lawyer could have saved him from such an unjust conviction.[13]

---

[12] This Court's decision in *Thomas v. Arn*, 474 U.S. 140 (1985), fully illuminates the incongruity of forcing new appellate counsel, on the direct appeal from a criminal conviction, to raise a claim of ineffective trial counsel that was not raised before or decided by the trial court. In *Thomas*, this Court condemned any procedure that "would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case," even if an issue had not been raised or litigated in the district court. Such a result "would be an inefficient use of judicial resources." 474 U.S. at 148.

[13] We must not lose sight of the ineffectiveness claim in this case. In the midst of Joseph Massaro's murder trial the prosecution suddenly produced a bullet that was mysteriously discovered three years after the murder in a car that the police had thoroughly searched on several occasions. The trial judge "repeatedly encouraged" defense counsel to accept an adjournment of the proceedings so that a proper investigation of this new evidence could be performed. Counsel failed to accept any continuance and had only the hastiest investigation conducted of *the* key

What is even worse, Joseph Massaro was never afforded his day in court concerning this constitutional claim, simply because he was on the wrong side of the significant divide that has opened in the Circuits over this question. Only this Court can now determine if Joseph Massaro should have the right to litigate this ineffectiveness claim in the same way as criminal defendants in all but the Second and Seventh Circuits.[14]

---

piece of evidence. Counsel even failed to request a copy of the video-taped re-enactment of the suspicious discovery of the bullet. Once his motion for a mistrial had been denied, trial counsel continued with the same strategy that he advanced in his opening statement, with barely any consideration given to the shocking revelation of the bullet evidence.

[14] For unexplained reasons, Judge Cedarbaum took three and a half years to rule, on the §2255 motion, that the Petitioner was procedurally barred from raising the ineffectiveness claim. The murder occurred in 1990. The trial was in 1993. The conviction was affirmed in 1995, and it took until November 29, 2000 for Judge Cedarbaum to hold that the court would not review his ineffectiveness claim.

CONCLUSION

For all the foregoing reasons, as well as those raised in the original petition, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

Dated: July 18, 2002

Respectfully submitted,

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688